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In the Supreme Court of the United States

OCTOBER TERM, 1955.

NO. 276

In the matter of

NARRAGANSETT PIER AMUSEMENT CORPORATION
ARTCRAFT PICTURES, INC.
MEYER STANZLER
JOSEPH STANZLER
MAX STANZLER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Narragansett Pier Amusement Corporation, Artcraft Pictures, Inc., Meyer Stanzler, Joseph Stanzler and Max Stanzler respectfully avers:

Opinion of the Court Below.

The opinion of the Court of Appeals for the First Circuit probably will be reported in 222 F.2d. A copy of the opinion is printed in the record (R. 138).

Date of Order Sought to be Reviewed.

The order of the Court of Appeals denying the motion of petitioners for leave to file petition for writ of mandamus was entered June 30, 1955 (R. 140). No petition for rehearing has been filed.

Jurisdiction.

Jurisdiction of this Court to issue the writ of certiorari applied for is invoked under Title 28, United States Code, § 1254 (1).

Questions Presented for Review.

This petition seeks a review of an order of the Court of Appeals for the First Circuit, denying a motion of the petitioners for leave to file a petition for writ of mandamus or alternative writ to vacate an order of the United States District Court, District of Rhode Island, referring to a special master all issues raised in eight actions that had previously been consolidated for trial. Five of these actions are so-called percentage fraud suits by major distributors of motion picture films; the other three are actions under the anti-trust laws of the United States by independent exhibitors.

The chief questions presented for review are:

A. Whether the court below erred in denying the motion for leave to file the petition for writ of mandamus, because

(1) The decision is in conflict with decisions of this Court and of several courts of appeals; or because

(2) By its denial of the motion the Court improperly renounced its jurisdiction to determine issues presented to it.

B. Whether the Court of Appeals should have issued a writ of mandamus directing the District Court to vacate its order of reference; and

C. Whether the District Court has exceeded its jurisdiction or abused its discretion—whether, in effect, it has usurped judicial power—by referring to a special master all issues in the eight consolidated actions.

Statutes and Rule Involved.

The case involves the "All Writs Statute" (28 U.S.C. § 1651), portions of the anti-trust laws (Act of October 15, 1914, c. 323, § 4, 38 Stat. 731; 15 U.S.C. § 15, § 16), and Rule 53 (b) of the Rules of Civil Procedure (28 U.S.C.). Copies are annexed to this petition (Appendix I, *infra*, p. 29).

Statement of the Case.

The petitioners are the operators of motion picture theatres located at Narragansett Pier, Wakefield, East Greenwich and Wickford in the State of Rhode Island. With the exception of the petitioner Max Stanzler they are defendants in five actions commenced on March 23, 1948, in the United States District Court for the District of Rhode Island by the five major distributors of motion picture films: Paramount Film Distributing Corporation, Loew's, Incorporated, Twentieth Century-Fox Film Corporation, Warner Bros. Pictures Distributing Corporation and RKO Radio Pictures, Inc. These actions were based upon diversity of citizenship and alleged the requisite jurisdictional amount.

In each action the complaint alleged in substance a conspiracy of the defendants to defraud the plaintiff by causing false statements of gross admission receipts to be made on pictures licensed on percentage terms, as a result of which the plaintiff was induced to accept as license fees sums sub-

stantially less than were actually due and was induced to grant licenses on flat rental and percentage pictures at terms substantially less than it would have granted, had the gross receipts been truthfully reported. (Ex. A; R. 2, 12). Subsequently six distributors waived their claims relating to flat rental pictures (R. 8).

With the answers were filed counterclaims of the petitioners Narragansett Pier Amusement Corporation and Arteraft Pictures, Inc. averring damage from a conspiracy of the five major distributors to restrain and to monopolize interstate commerce in motion picture films in violation of the anti-trust laws (Ex. B; R. 3, 17).

On February 7, 1949, the petitioner Narragansett Pier Amusement Corporation filed a complaint under the anti-trust laws against the five aforesaid major distributors of motion picture films and against five other distributors and two exhibiting corporations affiliated with the defendants Loew's and RKO. Subsequently it filed an amended complaint in three counts. (Ex. D; R. pp. 3-4, 35).

On March 24, 1949, the petitioner Arteraft Pictures, Inc., and the petitioners Meyer Stanzler, Joseph Stanzler and Max Stanzler brought two separate actions against the same defendants alleging substantially the same violations of the anti-trust laws, resulting in injury and damage to the two theatres separately operated by them (R. 5).

In each of these three actions the first count of the amended complaint was founded chiefly upon the great national conspiracy to restrain and to monopolize interstate commerce in motion picture films condemned in *United States* v. *Paramount Pictures, Inc.*, by the Expediting Court (D.C.S.D.N.Y.) 66 F. Supp. 323, 70 F. Supp. 53, 85 F. Supp. 881, and by this Court, 334 U.S. 131, 339 U.S. 974. (R. 4-5).

The similarity of the charges in the amended complaint to the findings of fact of the Expediting Court, after mandate from this Court, is shown in a tabulation in parallel columns

in an appendix to affidavit of counsel for the petitioners (Ex. I; R. 5, 114-128). It indicates that the final decrees and judgments in that suit, being *prima facie* evidence by virtue of 15 U.S.C. 16, should greatly simplify the issues here.

In these anti-trust actions counterclaims were filed by the defendants United Artists Corporation, Universal Film Exchanges, Inc., and Columbia Pictures Corporation, in the same general form as the complaints of the other distributors in the percentage cases, alleging that the plaintiffs had entered into a conspiracy to defraud the distributors by means of false percentage reports on films licensed to and exhibited by them (Ex. F; R. 6, 82). The claims of the distributors against some of the theatres, particularly in East Greenwich and Wickford, and more especially the counterclaims in the anti-trust actions, are pitifully small (See Argument, *infra*, C. 8).

On motion of the petitioners here for separation of issues for trial or for consolidation of the actions for trial, the District Court on March 15, 1954, entered an order consolidating the eight actions for trial (R. 7).

During the pendency of these eight actions extensive and expensive discovery proceedings were undertaken, chiefly upon the assumption that the actions would be tried directly to a jury (R. 7; Ex. I; R. p. 103).

It appeared from answers to interrogatories of the various distributors that the gross receipts reported by the theatre operators and by the "checkers", who were employed by the distributors to be present during the exhibition of the films and to verify the attendance and gross receipts, were substantially identical; but at a conference of the Court and counsel the distributors' attorney orally asserted that they expected to prove that the checkers had been bribed by the petitioners to make false reports (R. pp. 7-8).

During the pendency of these actions there were no pre-trial proceedings.

On April 29, 1955, the Court having indicated in a conference with counsel that he was considering the reference of some issues to a special master, the petitioners filed a motion that the actions be restored to the list for trial in due course by a jury, without reference of any issues to a special master (R. p. 8, Ex. G; R. p. 92).

On May 9, 1955, the plaintiffs in the percentage cases, defendants in the anti-trust actions, filed a motion to refer the actions to a special master (R. p. 8, Ex. H; R. p. 95).

On May 16, 1955, the petitioners filed an affidavit of counsel in support of their motion to restore actions to trial list and in opposition to the motion to refer the actions to a special master (R. p. 8, Ex. I, p. 100). The affidavit pointed out, among other things, the tremendous delays in various actions mentioned in a memorandum of the distributors that had been referred to special masters in Massachusetts and Maine, either by consent or without formal objection (R. pp. 101, 103-104). It emphasized the general practice of the courts to have anti-trust actions tried either to the court or to a jury, rather than by a special master (R. pp. 111-12). It commented upon the contentions made by the distributors in their memorandum, and asserted that there were no complicated issues and no real problems of auditing or accounting (R. pp. 109-110).

The affidavit also quoted from two separate decisions of the Appeal Board of the Motion Picture Arbitration Tribunals, established under the temporary consent decree in the *Paramount* Case, sustaining awards of two separate arbitrators abolishing clearance in favor of Providence first-run theatres against two theatres of one of the petitioners (R. pp. 106-107).

The distributors made no showing either by affidavit or evidence that the actions were exceptional or that the issues

were complicated. They filed a memorandum, however, a copy of which they subsequently incorporated into their brief on intervention in the Court of Appeals, which contained a discussion of law and many assertions of fact. (R. pp. 8-9).

Annexed hereto as Appendix II (*infra*, p. 31) are excerpts from this memorandum that illustrate their contentions as to each group of actions.

After a hearing on the respective motions the District Judge on June 2, 1955, entered an order of reference to a special master. It provided that the hearings should be from day to day, and that the compensation of the master should be one hundred dollars a day at hearings and twenty-five dollars an hour for time spent in deliberations and in the preparation of his report, one-half to be paid in the first instance by each group of litigants. The order recited (R. p. 9; Ex. J; R. p. 130):

> " . . . that in these cases consolidated for jury trial the issues are complicated beyond those in the generality of cases in this dist. :t, involving as they do claims of underreported grosses on percentage pictures of eight distributors over a period of six years at some or all of four theatres and consequent loss of other revenues as to at least two distributors, and also involving claims of conspiracy in violation of the Sherman Act to do a number of acts causing damage to the owners or operators of said four theatres, over periods of up to seventeen years, with the parties at issue over large numbers of transactions and over the correct results of the operation of each of the theatres involved insofar as such results may relate to issues in both the fraud and the antitrust cases, . . . "

In the Court of Appeals for the First Circuit the peti-

tioners filed a motion for leave to file a petition for writ of mandamus or alternative writ to vacate the order of reference. The distributors and the affiliated exhibitors in the anti-trust actions filed a motion, which was allowed by the Court, for leave to intervene and to file a typewritten brief in opposition to the motion of petitioners. (R. pp. 133, 137).

On June 30, 1955, the Court entered an order denying the motion of petitioners for leave to file petition for writ of mandamus (R. p. 140).

Argument.

A. The Court Below Erred in Denying the Motion for Leave to File the Petition for Writ of Mandamus.

The petitioners respectfully submit that the decision of the Court of Appeals is erroneous and should be reviewed by this Court because

(1) The decision is in conflict with decisions of this Court and of several courts of appeals; and because

(3) By its denial of the motion the Court renounced its proper jurisdiction.

1. *The Decision of the Court Below is in Conflict With Decisions of This Court and Of Several Circuit Courts of Appeals.*

In declining to hear the petition for writ of mandamus upon its merits the Court of Appeals has rendered a decision not only in conflict with decisions of other courts of appeals but even contrary to applicable decisions of this Court.

McCullough v. *Cosgrave*, 309 U.S. 635;

Cf. *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701, 708;

United States v. *Kirkpatrick* (C.A. 3) 186 F.2d 393, 398-9;

Webster Eisenlohr, Inc. v. *Kalodner* (C.A. 3) 145 F.2d 316;

See *William Goldman Theatres, Inc.* v. *Kirkpatrick* (C.A. 3) 154 F.2d 66—

See also 5 Moore Federal Practice 743, 747, and decisions cited in section B, 1, of this argument.

2. *By Its Denial of the Motion the Court Below Improperly Renounced Its Jurisdiction to Determine Issues Presented to It.*

In recent years the Court of Appeals for the First Circuit has adopted a policy toward mandamus and other extraordinary writs that is in effect a renunciation of its power and duty under the statute. Its philosophy has been expressed as follows:

> " . . . Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U.S.C. § 1651 grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit, and in particular to review by a writ of mandamus any unappealable order which we believe should be immediately reviewable in the interest of justice."

In Re Josephson (C.A. 1) 218 F.2d 174, 177.
quoted with approval in
In Re Sylvania Electric Products, Inc. (C.A. 1) 220 F.2d 423, 424.

These decisions are relied upon in the opinion in this case (R. p. 140).

Apparently the Court takes the view that no interlocutory order subsequently reviewable on appeal after final judgment can frustrate or impede its exercise of eventual jurisdiction to correct the error—if, indeed, the error should not be corrected by subsequent proceedings in the District Court—and that therefore its potential jurisdiction is not in need of any present aid.

Contrary to the decision of this Court in *Ex Parte Simons*, 247 U.S. 231, and various decisions by other courts of appeals, it has refused to determine on application for a writ of mandamus the validity of an order denying a jury trial—

In re Previn (C.C.A. 1) 204 F.2d 417—

or an order refusing to transfer a copyright infringement suit to the non-jury calendar.

In Re Chappel & Co. (C.A. 1) 201 F.2d 343.

Even where it exercised jurisdiction to review by writ of mandamus an order of a District Court transferring an action to another district outside the circuit it announced that in the exercise of its discretion it would not review such cases, except in really extraordinary situations, and "serve[d] notice that in the future . . . we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus."

In Re Josephson, supra, p. 183.

B. The Court of Appeals Should Have Issued a Writ of Mandamus Directing the Judge to Vacate the Order of Reference.

The petition for issuance of a writ of mandamus directing the District Judge to vacate the order of reference is the

proper method of reviewing that order; and the petitioners submit that the writ should have been issued, for the following reasons:

1. Mandamus lies to review an interlocutory order regulating the mode and sequence of trial.

2. An appeal after final judgment would be an inadequate remedy.

3. The public policy manifested by the anti-trust laws requires that private litigants be not discouraged by the prospect of unreasonable delay and expense.

4. It is of great public importance that trials be conducted expeditiously in open court.

5. Because of its public importance the question presented should have been reviewed by mandamus.

1. *Mandamus Lies to Review an Interlocutory Order Regulating the Mode and Sequence of Trial, Such as an Order Referring an Action to a Special Master.*

It seems to be the general rule that mandamus is proper to review an interlocutory order regulating the mode and sequence of trial when delay would be prejudicial or cause undue hardship and where a subsequent appeal would be inadequate. It has been used to review an interlocutory order, for example, referring a cause to a special master (see decisions cited in Section A of this argument); requiring a District Judge to vacate an order staying proceedings in an action—

McClellan v. *Carland*, 217 U.S. 268;
In re President and Fellows of Harvard College (C.C.A. 1) 149 F.2d 69;
Lyons v. *Westinghouse Electric Corp.* (C.A. 2) 222 F.2d 184, 186—

denying a party a jury trial—

Ex parte Simons, 247 U.S. 231, 62 L.ed. 1094;
Goldblatt v. *Inch* (C.A. 2) 203 F.2d 79;
William Goldman Theatres, Inc. v. *Kirkpatrick*, (C.A. 3) 154 F.2d 66;
Bereslavsky v. *Kloeb* (C.C.A. 6) 162 F.2d 862; cert. den. 332 U.S. 816;
Bereslavsky v. *Caffey* (C.C.A. 2) 161 F.2d 499; cert. den. 332 U.S. 770;
Alcoa S.S. Co. v. *Ryan* (C.A. 2) 211 F.2d 576;
Canister Co. v. *Leahy* (C.A. 3) 191 F.2d 255, cert. den. 342 U.S. 983;
See Moore's Federal Practice, vol. 5, pp. 743-747—

refusing to exercise discretion in deciding a motion for transfer—

Paramount Pictures, Inc. v. *Rodney* (C.A. 3) 186 F.2d 111, cert. den. 340 U.S. 953—

and transferring or refusing to transfer an action to another district, particularly if outside the circuit—

Norwood v. *Kirkpatrick*, 349 U.S. 29;
Cf. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 98 L.ed. 106;
In re Josephson (C.A. 1) 218 F.2d 174;
Dairy Industries Supply Ass'n v. *La Buy* (C.A. 7) 207 F.2d 554;
Chicago, R.I. & P.R. Co. v. *Igoe* (C.A. 7) 212 F.2d 378, 381;
Chicago, R.I. & P.R. Co. v. *Igoe* (C.A. 7) 220 F.2d 299.

2. *An Appeal After Final Judgment Would be an Inadequate and Ineffective Remedy.*

In *Ex parte Fahey*, 332 U.S. 258, 91 L.ed. 2041, in deplor-

ing the use of mandamus, prohibition and injunction against a judge, the Court said:

> " . . . We do not doubt power in a proper case to issue such writs. . . . These remedies should be resorted to only where appeal is a clearly inadequate remedy. . . . "

If the petitioners were to be compelled to proceed with the hearings before the special master, they might expect that at some time in the remote future the report of the master would be filed and the actions reached for trial before a jury. According to Rule 53 the reports would be evidence on all the issues in all the actions. The Court of Appeals has already indicated that a report of a special master would be considered *prima facie* evidence. *Cabell* v. *United States* (C.C.A. 1) 113 F.2d 998.

But the Clayton Act, Title 15, U.S. Code § 16, provides that a final judgment or decree in a proceeding by the United States under the anti-trust laws to the effect that a defendant has violated those laws—

> ". . . shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. . . ."

The first count of the amended complaint in the anti-trust actions is largely based upon the findings and judgments in *United States* v. *Paramount Pictures, Inc., et al.,* (D.C. S.D. N.Y.). Opinion, 66 F. Supp. 323; findings, conclusions, decree and memorandum in regard to findings and decree, 70 F. Supp. 53; opinion of S. Ct. 334 U.S. 131, 92 L.ed. 1260,

68 S.Ct. 915; opinion after rescript, 85 F. Supp. 881; findings of fact and conclusions of law (not reported); and final decrees against various defendant distributors, C.C.H. Tr. Cas. 1950-51, ¶62,573; opinion of Supreme Court on second appeal 339 U.S. 974, 94 L.ed. 1380, 70 S.Ct. 1031; re-hearing denied 340 U.S. 857, 95 L.ed. 627, 71 S. Ct. 69.

To make out a *prima facie* case, therefore, it is only necessary for the plaintiffs in the anti-trust actions to introduce, in addition to the final judgments, evidence of the impact upon them of the conspiracy and of the unlawful practices.

> *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 95 L.ed. 534, 71 S.Ct. 408.
>
> *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.* (C.A. 8) 194 F.2d 846, cert. den. 343 U.S. 942.

Two separate arbitrators have made findings that were subsequently affirmed by the Appeal Board established under the temporary consent decree in the *Paramount* Case to the effect that there was either no competition or insufficient competition between the theatres at Narragansett Pier and Wakefield and the Providence theatres to warrant clearance between them, and that clearance should be abolished (Ex. I, R. pp. 106-107). The petitioners do not contend that the arbitration awards are *res judicata,* but, when the appointment of a master is under consideration, they indicate clearly the existence of substantial evidence that an illegal system of runs and clearance was in effect in Rhode Island which had an impact upon the petitioners' theatres.

If, then, the special master were to make findings for the petitioners on the issue of liability, as they may reasonably expect, those findings might be *prima facie* evidence. But,

as the petitioners already have decrees that are also *prima facie* evidence, the report of the special master could hardly be of sufficient value to compensate for the delay and expense and inconvenience of the reference.

Obviously any findings as to damages would have an effect upon the jury, and might strongly influence their verdict. If the damages reported were, in the petitioners' view, inadequate, and if the jury adopted these findings, the petitioners would have extreme difficulty in obtaining relief.

If the findings of the master were adverse to the petitioners, and if the jury's verdicts adopted the findings, then obviously the petitioners' right to a verdict by an impartial jury, based only on evidence presented to them, would be impaired. But on appeal they might have the burden of satisfying the Court of Appeals, not only that the order of reference was erroneous, but also that the findings of the master substantially contributed to a wrong judgment. See—

Ford Motor Co. v. *Ryan* (C.A. 2) 182 F.2d 329, 330; cert. den. 340 U.S. 851.

The order of reference, therefore, will constitute an obstacle to appeal, which it is a function of mandamus "in aid of appellate jurisdiction" to remove.

Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26.
Ex parte United States, 287 U.S. 241, 246-7.

Examples of the inadequacy of appeal after final decisions on the merits are shown in—

Adventures in Good Eating, Inc. v. *Best Places to Eat, Inc.* (C.C.A. 7) 131 F.2d 809;
Tendler v. *Jaffe* (C.A. D.C.) 203 F.2d 14.

3. *The Public Policy Manifested By the Anti-Trust Laws Requires That Private Litigants Be Not Discouraged By the Prospect of Long and Unreasonable Delay and Expense.*

It seems to be the general view that the provision for the trebling of the amount of a verdict in an anti-trust action was intended by Congress to encourage the institution of actions by persons injured as a result of violations of the statutes, and thereby to create an auxiliary agency for the enforcement of the laws.

Maltz v. *Saxe* (C.C.A. 7) 134 F.2d 24, cert. den. 319 U.S. 772.

Package Closure Co. v. *Sealright Co.* (C.C.A. 2) 141 F.2d 972, 978.

Kinnear-Weed Corp. v. *Humble Oil Refining Co.* (C.A. 5) 214 F.2d 891, 893.

Karseal Corp'n v. *Richfield Oil Corp'n* (C.A. 9) 221 F.2d 358, 365.

Recently this Court has emphasized the policy of the law:

> " . . . Particularly is this so in view of the public interest in the vigilant enforcement of the anti-trust laws through the instrumentality of the private treble damage action."

Lawlor v. *National Screen Service Corporation,* U.S. , 99 L.ed. (Adv. Op.) 671.

It is extremely doubtful, however, if any injured person of moderate means would undertake the prosecution of an anti-trust action against great combinations of capital if he anticipated that many years later it would be referred for hearing and decision to a lawyer unknown to him who was designated a special master.

4. *It Is of Great Public Importance that Trials be Conducted Expeditiously in Open Court.*

It has long been the policy of the law, emphasized in the Federal Rules of Civil Procedure and in the equity rules which they superseded, that controversies should be decided in open court by a judge or a jury. Unnecessary delay and expense are thereby avoided, and litigants have more confidence in the judgment and greater respect for the court.

Los Angeles Brush Manufacturing Corp. v. *James*, 272 U.S. 701, 708.
Adventures in Good Eating, Inc. v. *Best Places to Eat, Inc.* (C.C.A. 7) 131 F.2d 809.

That policy has been clearly emphasized in the report adopted by the Judicial Conference of the United States, "Procedure in Anti-Trust and Other Protracted Cases", in which the Committee concludes (XIV, pp. 38-39);

> "1. That unnecessary delay, volume of record, and expense in judicial proceedings constitute an obstruction to the administration of justice; that such delay, volume and expense occur in a sufficient number of cases to constitute a serious problem."

Pre-trial proceedings are recommended as an effective means of preventing such conditions. A similar recommendation of pre-trial conferences is made in *United States* v. *Kirkpatrick* (C.A. 3) 186 F.2d 393, 398-9.

No such pre-trial proceedings have occurred in these cases.

Obviously the appointment of a special master to hear these actions will result in delay and expense. The experience of counsel for the petitioners in other anti-trust ac-

tions in Massachusetts and Maine (Exhibit I, R. pp. 100, 101-4) reveals almost incredible delay in the disposition of actions referred to special masters. Periods of approximately four years elapsed between the close of expensive and protracted hearings and the filing of the masters' reports. Periods of eight and nine years elapsed after the orders of reference before the final disposition of some actions by settlement. By way of contrast, in an action tried to a jury in Massachusetts a verdict was rendered in about two weeks, and in another action a settlement was made after less than nine full days of trial.

In the same affidavit (Exhibit I, R. pp. 100, 111) counsel estimated that the trial of these consolidated actions before a special master would be at least three or four times as prolonged as trial before a jury; that the hearings would take considerably more than six months; and that thereafter a period of probably six months to a year or more would elapse before the master's report was filed.

The petitioners now estimate that the expense of the proposed hearings before the special master to each group of litigants will probably run between $10,000 and $15,000.

5. *Because of Its Public Importance the Question Presented Should Have Been Reviewed by Mandamus.*

At the present time twenty-one private anti-trust actions affecting the motion picture industry are now pending in the First Circuit, excluding the three actions under consideration and another action in which a reference was made by consent of the parties. Undoubtedly a number of anti-trust suits relating to other industries have been filed. In all probability there are hundreds of such actions affecting the motion picture industry pending in the Federal courts throughout the country.

A trial judge may well be reluctant to defer the disposi-

tion of other actions on his docket to the trial of a tedious, protracted case, particularly where numerous exhibits are involved. If, then, at his pleasure he may refer all the issues in an anti-trust action to a master, and if the history of such actions in the First Circuit referred to masters (Exhibit I, pp. 100, 101-4) is any guide to the future, inevitably there must be a disastrous delay or failure in the administration of justice.

C. The District Judge Abused His Discretion and Exceeded His Jurisdiction by Referring These Actions to a Special Master.

It is respectfully urged that by the order of reference the District Judge has abused his discretion and exceeded his jurisdiction—that by it he has usurped judicial power not granted to him by law—for the following reasons:

1. An anti-trust action is not a proper subject of reference to a master.

2. In the anti-trust actions there are no complicated issues.

3. A reference to a master should be the exception.

4. A charge of conspiracy or fraud, involving disputed factual issues, usually is not a proper subject of reference.

5. In the percentage actions there are no complicated issues.

6. Extensive discovery proceedings have occurred upon the assumption that the actions would be tried directly to a jury.

7. A reference six or seven years after the actions were begun is improper.

8. The amounts involved in the percentage actions, particularly in the counterclaims, are wholly insufficient to warrant the expense of a reference.

1. *An Anti-Trust Action Is Not A Proper Subject of Reference to a Master.*

In the Report of the Judicial Conference entitled "Procedure in Anti-Trust and Other Protracted cases", already cited, the Committee states (XIII, p. 37):

> "Your Committee is of opinion that cases such as those here considered should not be referred in their entireties to masters."

Historically anti-trust damage actions have been tried to a jury.

Fleitman v. *Welsbach Co.*, 240 U.S. 27, 60 L.ed. 505, 36 S.Ct. 23;
Decorative Stone Co. v. *Building Trades Council*, (C.A.A. 2) 23 F.2d 426.

In recent years there have been many decisions relating to actions under the anti-trust laws affecting the motion picture industry; but in none is there an indication of a reference and report by a special master of any of the facts involved. From time to time the motion picture trade press reports decisions in various parts of the country, many of which never reach the published reports. The majority of the cases are tried to a jury, some to the Court. (See Affidavit, Exhibit I, pp. 100, 111).

So far as counsel is aware the only anti-trust actions in which any issues were referred to a special master were the Massachusetts and Maine actions mentioned in the distributors' memorandum in the District Court and in the affidavit of plaintiff's counsel (Ex. I, R. pp. 101-4) which were by consent or without formal objection, and two actions hereinafter mentioned. At the time of the references the Rules

of Civil Procedure had been in effect only a comparatively short time, and the powers of the court had not been defined. For years the Massachusetts District Court, following the practice in the State courts by reason of the Conformity Act, had exercised wide discretion in referring law actions to auditors.

In *William Goodman Theatres, Inc.* v. *Kirkpatrick* (C.A. 3) 154 F.2d 66, after a petition for writ of mandamus had been filed, the District Judge voluntarily offered to vacate his order of reference to a master for the assessment of damages; and the Court of Appeals indicated that such action would be appropriate.

The other anti-trust action in which a reference was made, but only on the issue of damages, was—

> *Connecticut Importing Co.* v. *Frankfort Distilleries, Inc.* (D.C. Conn.) 42 F. Supp. 225.

The action of *Krinsley* v. *United Artists Corporation* (D.C. N.D. Ill.) 94 F. Supp. 478, 119 F. Supp. 655, mentioned in the distributors' memorandum in the District Court as a "movie antitrust case" that had been referred to a special master, was not an anti-trust action but an interpleader to secure an interpretation of certain escrow agreements alleged to be illegal because of the anti-trust laws.

In *Brosius* v. *Pepsi-Cola Co.* (D.C. W.D. Pa.) 3 F.R.D. 335, an anti-trust action, a reference to a special master on the question of damages was denied.

2. *In the Anti-Trust Actions There Are No Complicated Issues.*

An anti-trust action may be protracted and tedious, but the issues are not necessarily complicated. Here the issues

have been simplified not only by the awards of two arbitrators in two clearance proceedings but also by the findings and conclusions and decrees of the Expediting Court and by the decisions of this Court in the *Paramount* Case.

Many other decisions have had the same effect, of which only a few are listed:

Bigelow v. *RKO Radio Pictures, Inc.* 327 U.S. 251;
United States v. *Griffith*, 334 U.S. 100;
Schine Chain Theatres, Inc. v. *United States*, 334 U.S. 110;
Theatre Enterprises, Inc. v. *Paramount Film Distributing Corporation*, 346 U.S. 537;
Milwaukee Towne Corporation v. *Loew's, Inc.* (C.A. 7) 190 F.2d 561;
Twentieth Century-Fox Film Corp. v. *Brookside Theatre Corp.* (C.A. 8) 194 F.2d 846;
Loew's, Inc. v. *Cinema Amusements, Inc.* (C.A. 10) 210 F.2d 86.

In the *Milwaukee Towne* Case, *supra*, pp. 570-1, when discussing attorneys' fees, the Court pointed out that the case was not unique; that the law relative to conspiracy and the measure of damages was well established; and that, although many cases were extremely difficult to fathom, it could not be contended that the charge of conspiracy was difficult to prove.

It is true that in the order of reference (Ex. J; R. p. 130), adopting the exact language suggested by the distributors and affiliated exhibitors in their motion for reference (Ex. H; R. p. 97), the preamble recited that "the issues are complicated beyond those in the generality of cases in this District;" but it is equally true that no evidence was introduced on which this recital could be based, as seemed desirable to the Court in—

William Goldman Theatres, Inc. v. *Kirkpatrick* (C.A. 3) 154 F.2d 66.

In *McCullough* v. *Cosgrave*, 309 U.S. 635, the recitals in the order of reference were much stronger. The order stated, among other things, that the patent suits would "require a protracted trial of complicated issues;" and that "the Court finds an exceptional condition exists which requires and warrants a reference to a master." But this Court did not hesitate to issue a writ, requiring that the order of reference be vacated.

Obviously an anti-trust action or a patent infringement case is not as simple to try as an ordinary tort or contract action. But there is no recital that the issues are more complicated than those in the ordinary anti-trust action; because, so far as counsel is aware, the present District Judge has had no experience with the trial of anti-trust actions, certainly of any such actions affecting the motion picture industry.

In Appendix II (*infra*, p. 31) are excerpts from the memorandum of the distributors and affiliated exhibitors to the District Court, a copy of which was incorporated in their brief as intervenors in the Court of Appeals. In effect they say that in addition to the alleged violations of the anti-trust laws affecting liability (which, as shown in the parallel columns in the affidavit (Ex. I; R. pp. 100, 114) have already been determined in the *Paramount* Case) the petitioners will have to prove the damage sustained and that the distributors challenge their figures as to income and expenditures.

In proving damages it may be relevant to establish what the gross receipts and expenses were at the petitioners' theatres. But, as stated hereinafter in regard to the percentage cases, the question is not one of accounting, but of

fraud, and in all probability any conclusion as to fraud or the absence of fraud would apply to all the contested items.

3. *A Reference to a Master Should Be the Exception.*

Before the adoption of the new rules, when discovery proceedings were confined to a supplementary suit in equity to secure information by means of interrogatories, a reference to an auditor of a protracted case involving extensive computations may well have aided in eliminating untenable contentions and in shortening the time of trial before a jury. See *Ex parte Peterson*, 253 U.S. 300, decided about eighteen years before the adoption of the new rules.

Substantially everything that an auditor could accomplish under the old procedure may now be accomplished by intensive pre-trial conferences in accordance with the recommendations of the Committee set out in the report of the Judicial Conference. Only in an exceptional case, therefore, where after pre-trial conference complicated issues cannot be simplified, should a reference be made to a special master.

See *Hartford-Empire Co.* v. *Shawkee Mfg. Co.* (D.C. W.D. Pa.) 5 F.R.D. 46, where, notwithstanding a congested docket and the prospect of a burdensome trial, the Court refused to avail itself "of the relief which a reference to a master would furnish."

4. *A Charge of Conspiracy or Fraud, Involving Factual Issues, Usually Is Not a Proper Subject of Reference.*

A charge of conspiracy or fraud raises an issue of fact that depends upon inferences and upon credibility and to a considerable extent upon oral testimony. Such an issue is primarily within the province of the jury. See—

Coyner v. *United States* (C.C.A. 7) 103 F.2d 629;
Adventures In Good Eating, Inc. v. *Best Places to Eat, Inc.* (C.C.A. 7) 131 F.2d 809;
Tendler v. *Jaffe* (C.A. D.C.) 203 F.2d 14.

5. *In the Percentage Actions There Are No Complicated Issues.*

In the memorandum of the distributors and affiliated exhibitors (Appendix III, *infra*, p. 33) they assert at some length their contentions in regard to the percentage actions.

In substance the distributors are saying that they challenge the figures of the petitioners as to receipts and expenses of their four theatres during a period of six years —although, as they also say, the petitioners have only "skimpy" records for one and one-half years—from bank records and undisclosed "other sources"; and that they will have some expert witnesses with "voluminous schedules".

There can be no controversy as to the figures shown on the deposit slips or the ledger sheets of the bank, or on the daily boxoffice reports or on the percentage reports to the distributors. No question of accounting, therefore, is involved. Without any great difficulty counsel could have these figures tabulated in parallel columns. The only issue then would be which column of figures represented the actual gross receipts. (See Exhibit I; R. pp. 100, 110)

If the distributors intend to try to prove that the checkers' reports were erroneous, because the checkers had been bribed, a question of fact—the existence or non-existence of fraud—would be raised. On it the distributors' entire case would rest. That involves, not a question of auditing or accounting, but an issue of credibility.

6. *Extensive Discovery Proceedings Have Occurred Upon The Assumption That the Actions Would Be Tried Directly To A Jury.*

The depositions taken in these actions have comprised about 2363 pages, at a cost to the petitioners of $1942.05. The distributors also paid for their copies. Considerable expense was incurred in travel and in securing the attendance of witnesses. A large number of exhibits have been produced and examined, and many have been photostated at substantial expense. (Exhibit I, pp. 100, 110-11). Comprehensive interrogatories have been answered by the distributors and affiliated exhibitors.

Obviously these activities would not be necessary in suits to be referred to a special master. The hearings before him, conducted in a leisurely manner with time to correct errors and omissions, would accomplish all the purposes of formal discovery proceedings.

7. *A Reference Six Or Seven Years After The Actions Were Begun Is Improper.*

If these actions were to be referred to a special master, the order should have been made within a short time after issue was joined, instead of six or seven years later, after discovery proceedings had been completed and the actions were on the list for trial by jury.

8. *The Amounts Involved in the Percentage Actions, Particularly in the Counterclaims, Are Wholly Insufficient to Warrant the Expense of a Reference.*

Annexed to the affidavit of counsel (Ex. I; R. pp. 100, 129) is a tabulation showing the claims of the distributors, as stated in their answers to interrogatories. Apparently these claims are intended to cover a period of six years.

It will be noted that the total claims of seven distributors relating to the theatre in Wakefield are $7,455.07, and in Greenwich $6,877.24, and that the total claims of six distributors relating to Wickford are $827.57. Of these only one claim is more than $300; only one additional claim is more than $200; and the claims of three distributors relating to Wickford are, respectively, $18.17, $4.82 and $18.79.

Columbia's counterclaims relating to the four theatres are $274.57, $44.38, $265 and $18.79, a total of $602.74.

It would seem that these claims are entirely too insignificant to warrant the consideration of a United States court, not to mention an expensive hearing before a special master and a subsequent trial before a judge and a jury.

Conclusion.

In these consolidated actions—five percentage suits and three percentage counterclaims and three anti-trust actions —it would seem that the percentage claims, some for pitifully small amounts, have been allowed to overshadow the anti-trust actions, all asking for substantial damages. In effect the tail is wagging the dog. Anti-trust and fraud issues generally are not proper for reference to a master. The public policy manifested by the anti-trust statutes should not be defeated by making private actions so costly that prospective litigants will be deterred from asserting their rights.

The trial of these consolidated actions necessarily will be protracted. But there are provisions in the Rules of Civil procedure and in the recommendations by the Committee of the Judicial Conference for dealing in an efficient manner with protracted cases. The District Judge erred by disregarding these rules and recommendations and seriously abused his discretion and exceeded his proper jurisdiction by making the order of reference.

In denying the motion for leave to file petition for writ

of mandamus the Court of Appeals made a decision in conflict with the applicable decisions of this Court and of several courts of appeals, and in effect renounced its proper jurisdiction.

The petition raises issues that are of great importance in the administration of justice, both in the district courts and in the courts of appeals. It is respectfully urged, therefore, that the petition should be allowed and the issues determined.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued by this Honorable Court, directed to the Court of Appeals for the First Circuit, commanding that Court to certify and to send to this Court a full and complete transcript of the record and of all proceedings material to the motion for leave to file petition for mandamus or alternative writ of the petitioners *In the Matter of Narragansett Pier Amusement Corporation, et al,* to the end that the case may be reviewed and determined by this Court as provided by law, and that the petitioners may have such other and further relief as to this Court may seem just and proper.

By their attorneys,

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Appendix I.

STATUTES AND RULE INVOLVED.

All Writs Statute.

(28 U.S.C. § 1651)

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Federal Anti-Trust Laws

(15 U.S.C.A.)

§ 15. *Suits by persons injured; amount of recovery*

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 16. *Judgment in favor of Government as evidence; limitation of actions*

A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any

suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* This section shall not apply to consent judgments or decrees entered before any testimony has been taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof. Oct. 15, 1914, c. 323, § 5, 38 Stat. 731.

RULES OF CIVIL PROCEDURE

Rule 53 (b) "*Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

Appendix II.

Excerpts From Memorandum of Distributors and Affiliated Exhibitors in District Court.

"With respect to the antitrust cases, quite apart from complexity of liability issues (which, as noted, point 2, infra, warrant reference), the instant cases are complicated for a reason not present in most antitrust cases where defendants can accept plaintiff's books as correctly stating the facts as to his operation. The parties are not agreed on the basic figures which enter prominently into considerations of both liability and damage; the distributors contend that Stanzlers' figures are greatly in error. The distributors are prepared to develop this fully as to six of the years of the alleged antitrust damage periods and for that reason will have to scrutinize and probably reconstruct like figures for other years.

"This involves largely matters relevant also in the percentage cases, and a reference of it will clearly save much of the time of court and jury on a later trial."

* * *

"As consolidated for trial, these three separate cases and five counterclaims present, *inter alia*, the following antitrust issues: Whether or not the instant parties

(1) engaged in a national conspiracy and/or

(2) a local, Providence, area conspiracy to

  (a) control production, distribution and exhibition in interstate commerce;

  (b) regulate admission prices;

  (c) stifle competition of independent producers;

  (d) put independent exhibitors out of business by the specific steps of:

(3) imposing block booking and blind buying;

(4) establishing structures of run and clearance;
(5) fixing admission prices charged by exhibitors;
(6) entering into
    (a) pooling arrangements
    (b) master agreements and franchises
(7) granting privileges to affiliated theatres — and whether the distributors, acting separately,
(8) entered into contracts illegally providing for
    (a) block booking and blind buying;
    (b) minimum admissions;
    (c) favors and privileges to the RKO and Loew's theatres and 'other' theatres in Providence;
    (d) excessive film charges to the Stanzlers.

"It should be noted that the above is a minimum listing of issues; the amended complaints contain many other specifications of conspiratorial action and resulting damages which presumably will be put in issue, viz., formula deals, credit committees, standard contracts, et cetera.

"Moreover, the foregoing must be established with respect to not one but four theatres over various periods:

Casino, Narragansett Pier	1932-49
Community, Wakefield	1932-49
Greenwich, East Greenwich	1939-49
Wickford, Wickford	1941-49

"The circumstances of each theatre vary widely and some or all of activities that might be found to have affected one might well be completely inapplicable as to the others.

"In addition to the matters of liability noted above, questions of damages present fully as many issues of equal complication. The Stanzlers cannot have the recovery for actions which as to them are abstractly illegal only. (*Momand* v. *Universal Film Exchanges,*

Inc., 43 F. Supp. 996, 1012 (Mass., 1942)). It, therefore, becomes necessary in every one of these cases where plaintiff presents some evidence of alleged improper conduct for the plaintiff to present evidence of injurious effect proximately and directly resulting therefrom in order to recover.

"As earlier stated, the distributors have good warrant for challenging not only the Stanzlers' theories or claimed facts of damage but their *figures* as well. Thus, in the reasonable scope of their antitrust defenses, findings by the factfinder of Stanzlers' income and expenditures in the relevant periods will be required. Even absent the Stanzlers' underreporting their claim of being illegally charged unreasonable prices would necessitate such picture-by-picture computations. While these items, in part, can be segregated (See Point I, supra, page 5), it is more satisfactory to deal with them in the full frame of reference."

• • •

"The percentage claims in their entirety and the questions of the correct figures as to income and expenses (including film costs) at four Stanzler theatres in the relevant periods present 'issues which are complicated'.

"The voluminous schedules of the distributors' answers to percentage claim interrogatories show the manifold detail of figures, underlying financial records and arithmetical computations that are inevitably required. These, moreover, represent the claims, not the proof. The distributors' claims cover six years. The Stanzlers have financial records for, at the most, the last one and one half years and those are skimpy and marked up and corrected. Accordingly, it is necessary to reconstruct from bank deposits and other sources

over six years the receipts for every day that a percentage picture played at each of the four theatres.

"At the two largest theatres—Casino and Community—receipts were deposited daily in the same bank with no indication of which of two or more deposits shown for a day on the monthly bank statement belongs to a particular theatre. In view of the nature of the claims little or no concession of points by Stanzlers is expectable. Accordingly, it becomes necessary by means of deposit slips and other sources to have expert accounting testimony allocating thousands of dollars of receipts, as shown to the correct theatres.

"Then, as conceded earlier, the reports of distributors' checkers in many instances conform to the grosses reported by Stanzlers. We are prepared to overcome the force of this in various ways; to do so it will probably be advisable to corroborate the bank deposit figures from a *number* of available sources including tax returns and discontinuities in serially numbered tickets.

"The bulk of distributors' case will be put in by expert accounting witnesses and custodians of record and will involve numerous voluminous schedules."

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In the
Supreme Court of the United States.

OCTOBER TERM, 1955.

No. 276.

IN THE MATTER OF

NARRAGANSETT PIER AMUSEMENT CORPORATION ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Questions Presented for Review.

(1) Whether a Court of Appeals may decline formal review, in mandamus proceedings, of an unappealable interlocutory order appointing a master in eight consolidated fraud and anti-trust cases, having considered the issues before declining to accept the mandamus petition.

(2) Whether the appointment of a master to hear eight consolidated cases presenting anti-trust and fraud issues and manifold accounting problems at four theatres over periods of six to seventeen years constituted an abuse of a trial judge's discretion under Rule 53(b).

Statement.

The appointment of the master.

Judge Day, after a hearing, appointed a master in eight cases (R. 97),* five of which had been brought in 1948 against the petitioners here to recover for alleged fraud in connection with payments due for licensing of pictures (R. 2) (percentage fraud cases) and three of which (the anti-trust cases) had been brought in 1949 by the petitioners here against the plaintiffs in the percentage fraud cases and other corporations in the motion picture business (R. 3-5), all whom are respondents here. The eight cases were consolidated for trial on motion of the petitioners here (R. 7).

Interim postponements.

The master was appointed on June 6, 1955, hearings to begin June 22 (R. 130-131). The hearing date was set forward the first time to July 6 to allow petitioners to apply for mandamus to the Court of Appeals (R. 133, semble) and again to August 3 (and then August 10) to allow petitioners to ask for a stay in this court.

The master's hearings have proceeded under the order beginning August 10, 1955, stays having been denied in three courts.

The Circuit Court having declined to act on mandamus, and thereafter a stay, pending action by this court, having been denied by Judge Day in the District Court,† and there-

*References: R—Certified Copy of Proceedings; P—Petition for Writ of Certiorari.

†An interim stay to allow petitioners to see if a justice of this court would grant a stay *was* granted in the District Court.

after both by Judge Hartigan in the Court of Appeals on July 21, 1955, and by Mr. Justice Frankfurter in this court on August 2, 1955, hearings began before the master on August 10, 1955. Hearings have continued in each week through at least August 18th, when this brief was typed.*

There are fraud and anti-trust issues in all eight cases.

Three of the respondents in the anti-trust cases set up percentage fraud counterclaims in their answers (R. 6, para. 9(b)-(6)). In the percentage fraud cases counterclaims were filed alleging violations of the anti-trust laws (R. 3).

Four of the respondents here, viz., the distributors Monogram and Republic and the exhibitors Loew's Theatre and Realty Corporation and RKO Rhode Island Corporation, were not parties to *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 339 U.S. 974, and the other respondents here were parties to that case.

Petitioners (hereinafter sometimes referred to as Stanzlers) also assert the relevance of certain arbitration awards (P. 14, R. 106, 107). Only five of the respondents here were parties to one of the arbitrations (Loew's, Fox, RKO, Paramount and Warners) and only three of these (Loew's, RKO and Warner) were parties to the other (R. 106, 107).

The order found complicated issues.

Judge Day in his order (R. 97) found that in the eight subject cases "the issues are complicated beyond those in the generality of cases in this district. . . ."

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*The facts as to the postponements to August 10, the attempts to obtain stays and the hearings before the master are not in the record, but as they are undisputed and appear relevant, respondents have stated them in this brief.

The Court of Appeals considered the submissions to it which set out the issues.

The Court of Appeals in its opinion denying leave to file the mandamus petition said it had considered the motion for leave to file, the supporting brief, the proposed petition and the brief of these respondents in opposition (R. 139-140), and that it appeared to the court that "no exceptional circumstances are present which would necessitate, or render it appropriate for an anticipatory review of the unappealable order. . . ." (R. 140).

Argument.

The essential question presented to this court by the record below is whether the petitioner's motion for leave to file a petition for writ of mandamus should have been allowed by the First Circuit, which, in order to effectuate the rule against piece-meal review affirmed by this court on a number of occasions, has adopted the practice of barring at the threshold the bulk of petitions for mandamus seeking to review unappealable interlocutory orders.

The effect of this practice in these cases was entirely correct. There is presented no aspect of meaningful conflict of decision with other circuits and no important question.

Moreover, there is every indication that a direction to the First Circuit to accept and formally consider the petition for mandamus would not void the order appointing the master, or proceedings under it. The record shows that the order appointing the master was fully justified and clearly within the judge's discretion and, furthermore, hearings under it are proceeding and may be concluded before October 1, 1955.

I.

THE APPOINTMENT OF A MASTER WAS SO CLEARLY A PROPER EXERCISE OF DISCRETION THAT INTERLOCUTORY REVIEW BY MANDAMUS WAS UNWARRANTED.

A. The cases in this court do not support the arguments for review.

The occasions for the use of such an extraordinary writ as mandamus under the All Writs Act (28 U.S.C. § 1651(a)) are stated in *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 382, 383.

That case says that the traditional use of the writ " 'has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so' " (382); also that "The supplementary review power conferred . . . in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in *De Beers Consolidated Mines* v. *United States,* 325 U. S. 212, 217 (1945)."

In the *De Beers* case there was a clear usurpation of judicial power, for the court found that the injunction which had been issued was not authorized either by statute or by the uses of equity (223).

Per contra, it was within the power of the district judge to appoint a master in the instant cases—exceptional cases presenting complicated issues—if after consideration, in his discretion, he felt such action would serve the ends of justice.

The record as presented by the petitioners shows the basis for a judicial decision that these cases were within Rule 53(b) (Point I, B, *post*).

The case of *McCullough* v. *Cosgrave,* 309 U.S. 634, on which the petitioners rely (P. 8, 23), does not support the

view that the order was either unlawful or an abuse of discretion.

This court has said what the *McCullough* case means in *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 31. While the opinion in *McCullough* (being a short *per curiam*) does not disclose it, it is apparent from the *Roche* decision that the record in *McCullough* shows, as this court said in *Roche,* that there was disclosed there a "persistent disregard of the Rules of Civil Procedure prescribed by this Court" (319 U.S. 21, 31) through the regular practice of appointing masters in cases of the kind there presented.

Recitals in the decree* in the *McCullough* case of exceptional situation and complication were not significant (as petitioners claim they were, P. 23). Those recitals were belied by the actual practice of the court. In fact, in that case it was shown that it was *the practice, not the exception,* to appoint masters. That was a direct and obvious violation of the rule.

In the instant cases there is no suggestion whatever of any practice to appoint masters—on the contrary the court has found these cases to have issues "complicated beyond those in the generality of cases in this district" (R. 97) thus clearly indicating the exceptional nature of the action. And the complicated issues were expressly found and are shown on the record.

B. The record shows abundant basis for the finding of the trial court (R. 97) that "the issues are complicated beyond those in the generality of cases in this district. . . ."

(1) *It is apparent from the claims of fraud that the proof here does not lie on the surface of the records of either plaintiffs or defendants.* There is forecast the use of sec-

*This part of the decree may be found in *United States* v. *Kirkpatrick,* 186 F. (2d) 393, 398.

ondary sources of figures and expert accounting witnesses, and the reconstruction of the truth of thousands of daily transactions over a six-year period for four different theatres.*

It is apparent from the claims of fraud that the distributors do not accept the Stanzlers' figures as to the results of their operations.

The petitioners have no anti-trust claims unless they are damaged (*Burnham Chemical Co.* v. *Borax Consolidated*, 170 F. (2d) 569, 575 (C.A. 9, 1948). The amount of their recovery, if any, will depend on figures which are in contest, or must be found on reconstruction of accounts. There is therefore, in this important respect, a complication not found in anti-trust cases where the plaintiffs' figures are not contested. This is a complication particularly suited to resolution by a master, with great saving of time for court and jury.

Factors like those present here have been held in a number of jury cases to warrant references or, where references were challenged, to sustain the trial court's action.

Veneri v. *Draper*, 22 F. (2d) 33 (C.C.A. 4, 1927); cert. den. 276 U.S. 633, 634.

Irving Trust Co. v. *Trust Co. of New Jersey*, 75 F. (2d) 280 (C.C.A. 2, 1935).

In the leading case of *Ex Parte Peterson*, 253 U.S. 300 (1920), the Supreme Court denied plaintiff's petition for a writ of mandamus against Judge A. N. Hand for vacation of a reference to an auditor in a suit at law (where later jury trial was contemplated) for a balance due as stated on

*The case in this respect as it was argued to and presented before Judge Day is indicated in the excerpts (from the brief of May 2, 1955, of parties who are respondents here) which have been set out by petitioners in the Appendix to their petition (P. 31-34).

a schedule of 300 items with counterclaims involving 400 items. Implicit in the opinion is the idea that "complex" issues and "voluminous" evidence justified the reference (*ibid.* at 313, 314).

William Goldman Theatres, Inc., v. *Kirkpatrick*, 154 F. (2d) 66, 68 (C.A. 3, 1946), is not a holding on the question of reference; the issue was moot in the Court of Appeals and not passed upon.

Elsewhere percentage fraud cases like the instant cases have been tried either before masters or jury-waived.

> *Loew's Inc.* v. *Lieberman*, 75 F. Supp. 201 (D.C. D. Mass. 1948).

Use of a master in an anti-trust case to find the figures on which liability and damage would be predicated was found authorized by Rule 53(b) in *Connecticut Importing Co.* v. *Frankfort Distilleries*, 42 F. Supp. 225 (D.C. Conn. 1940).

(2) *The anti-trust cases present many involved issues apart from those resulting from the contest over figures.* Anti-trust complexities are set out in Appendix II of the petition (P. 31-34) (excerpts from respondents' brief before Judge Day).

(3) *Neither the decrees in United States v. Paramount nor the arbitrator's award renders these cases non-complicated.*

These cases are *not* simplified, as petitioners contend (R. 106, 107), because of the decrees in *United States* v. *Paramount* and the arbitration decisions. On the contrary, the proposed use of these decrees and awards complicates the

issues. Under the Clayton Act the anti-trust decrees are admissible as prima facie evidence only against the parties thereto. Against the four non-party respondents (even if *United States* v. *Paramount* decrees are admissible at all, which respondents do not admit) the petitioners will have to offer as much evidence as though that case had not been decided. Furthermore, a careful course must be steered to avoid prejudice to those not affected by that decree.

The same situation prevails as to the arbitration awards, which in any event (even if admissible at all, which respondents do not admit) are not admissible against many of the respondents.

Moreover, the *Paramount* findings speak only as of 1945 (see *Theatre Enterprises, Inc.*, v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 543), whereas the instant anti-trust complaints state a claim of conspiracy continuing until 1949 (P. 4), of which additional evidence must be produced.

Finally, the core of the petitioners' complaint here is the existence of unreasonable clearance affecting their theatres. The Expediting Court in *Paramount* explicitly stated its inability to find any discrimination with respect to clearances (66 F. Supp. 323, at 353), and this exclusion from the otherwise broad condemnation of the *Paramount* decree makes the decree irrelevant in this aspect of these cases.

Hillside Amusement Co. v. *Warner Bros.* (C.A. 2, No. 264, decided June 29, 1955).

In the *Hillside* opinion the court said: "The plaintiff claims prejudicial error in the court's refusal to receive in evidence the decree in the case of *United States* v. *Paramount Pictures,* D.C. S.D. N.Y., 66 F. Supp. 323, affirmed in part, reversed in part, 334 U.S. 131. The court there, however, explicitly stated its inability to find dis-

crimination with respect to film rentals and clearances, 66 F. Supp. 323, at 353; and this exclusion from the otherwise broad condemnation of its decree makes the decree irrelevant here."

In sum, it is submitted that these eight consolidated cases present in high degree the exception which Rule 53(b) contemplates. The words of Learned Hand, J., in *Helene Curtis Industries* v. *Sales Affiliates*, 199 F. (2d) 732, 733 (C.A. 2, 1952) are applicable. "[The] . . . very existence of a rule providing for an exceptional course, means that occasionally that course may be followed."

II.

NO IMPORTANT ISSUE IS PRESENTED UNDER THE CLAIM OF DIFFERENT ATTITUDES OF THE CIRCUITS TOWARD MANDAMUS (P. 8 ET SEQ.).

The cases cited in the petition, all arising in the Third Circuit, do not represent any meaningful conflict of decision, as to the availability of mandamus to review appointment of a master, with the result reached herein by the First Circuit.

United States v. *Kirkpatrick*, 186 F. (2d) 393 (C.A. 3, 1950), involved "a general compulsory reference of all the issues in a group of admiralty cases . . ." which "was beyond the power of the District Court . . ." In *Kirkpatrick*, therefore, issuance of the writ of mandamus was warranted by the "traditional use" of the writ to "confine an inferior court to a lawful exercise of its prescribed jurisdiction" (*Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26). The First Circuit recognizes the propriety of granting the writ in such a case. *In re Josephson*, 218 F. (2d) 174, 180, 183 (C.A. 1, 1954). Similarly, *Webster Eiserlohr, Inc.*, v. *Kalodner*, 145 F. (2d) 316 (C.C.A. 3, 1944), involved an

order of reference "which went far beyond anything involved in the issues presented in the litigation" and represented use of the writ to confine a lower court to its prescribed jurisdiction.

In *Wm. Goldman Theatres, Inc.*, v. *Kirkpatrick*, 154 F. (2d) 66, 68 (C.C.A. 3, 1946), the issue of reference became moot pending appeal, and the case is hardly support for an asserted conflict of decisions.

Questions of whether the First Circuit is in conflict with other circuits on the use of mandamus to review unappealable orders which *stay proceedings, deny a jury trial* or *transfer to another district* (P. 11, 12) are not presented here. It is understood that this court does not review to correct a conflict of decision not presented by the particular case. Such an opinion would be advisory only.

> See *General Talking Pictures Corp.* v. *Western Electric Co.*, 305 U.S. 124.

This case does not present a question of importance in the area of federal procedure.

Mandamus is a discretionary writ. The Court of Appeals examined and considered all the record and the briefs (R. 140). These disclosed that there was no substance in the claim that Judge Day had erred in law or abused his discretion.

Therefore the finding of the Court of Appeals (R. 140) that there were "no exceptional circumstances present" which would necessitate or render appropriate the anticipatory review which mandamus would give (R. 140) was clearly warranted.

Even if the Court of Appeals should have allowed the petition to be filed, no error has resulted calling for an extraordinary writ from this court. The clear propriety of Judge Day's action within his discretion is shown. The

expectable ultimate result, even if the First Circuit were formally to accept the mandamus petition, would therefore be its refusal to grant the writ.

Moreover, since the cases have been at trial before the master from August 10 forward, it is probable that the hearings will be ended before review in this court can be completed. The review sought is of a case that promises to be moot before the court can act.

> See *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 998*, v. *Wisconsin Employment Relations Board*, 340 U.S. 416.

Wherefore respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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